DING CHA HEE

v.

TAN WAN ENG & HONG KOK CHEONG & ORS.

HIGH COURT MALAYA, IPOH
ABDUL MALEK AHMAD J
[CIVIL SUIT NO. 23-66-87]
4 JULY 1991

CONTRACT: *Sale of land - Deed of assignment - Failure to transfer property - Abandonment of project - Developers acted as agents for landowners - Purchase price set-off - Bare trustee - Effect of termination of agreement - Whether party to agreement - Whether suffered actual loss - Breach - Interference with contractual rights of others - Housing Developers (Control & Licensing) Rules 1970, rr. 11, 12.*

On 1 August 1984, the third defendant (developers, D3) had sold the said property to the second defendant contractors, D2, with the consent of the first defendants (D1), who were the registered owners. D2 then assigned the rights and interests under this agreement to the plaintiff, P, (the said deed). The said property, which was then in the course of construction, had been charged by D3 to PHB. P had paid RM89,000 to the lawyers of D2 and D3 (as stakeholders). On 11 February 1987, construction work on the property was abandoned. P claimed that there had been a breach of the agreement because neither D2 nor D3 were able to transfer the property to P free of encumbrances and neither was the shophouse completed 18 months after the date of the agreement. It had always been P's stand from the start that he was prepared to pay the balance of RM151,000 due provided it is less the compensation payable to him for late delivery, the redemption sum payable to PHB and other incidental payments. P claimed damages for late completion and special damages for expenses incurred in completing the construction of the property and sought an order for the transfer of the property to him.

D2 had also applied by way of summons-in-chambers on 19 June 1987 for final judgment against P for RM158,100, interest and costs as claimed in their counterclaim. D2 also counterclaimed against D1 and D3, asking for a declaration that RM589,000 is due and payable to them under the building agreement dated 30 November 1983 and that the sum be set off against the purchase price of RM600,000 for the two shoplots purchased by them pursuant to the set off agreement dated 24 September 1984 and damages for breach of contract, interest and costs. As against D1, D2 had asked for damages for wrongful and illegal interference in the contractual relationship of D2 with D3. The matter between P, PHB, D1 and D2 was settled. However the issues which remained were D2's counterclaim against D1 and D3 and D1's counterclaim against D2. D3 owed D2 RM589,000 for work done as per the architect's certificate. Since D2 had paid all monies due under the set-off and P was willing to pay the balance due and had in fact settled the matter, the only issue was whether D1 are just as liable as D3 as regards the late delivery of the property.

Held:

[1] This situation is aptly covered by rr. 11 and 12 of the Housing Developers (Control and Licensing) Rules 1970. D3 had acted as agents for the D1 in disposing of the lots and as the purchasers had paid the full amounts, as in the case of D2 here, and D1 had parted with their interest, D1 were merely trustees for the purchasers. The fact that D1 had not received

the money is not relevant as the purchase price was in fact set off against D3 by D2. As D1 and D3 had failed to deliver the said lot and shophouse thereon free of encumbrances to D2, they had been unable to deliver the same to P and had lost the RM151,000 balance of the purchase price in the process. The fact that D1 did not consent to the assignment of the said lot and shophouse thereon from D2 to P is irrelevant. By terminating the joint venture agreement with D3, D1 had consequently also interfered with the contractual rights of the purchasers and contractors of D3. Both the purchasers and contractors have a right to damages against both D1 and D3 who are of course entitled to claim against one another.

[2] It is also clear from the evidence that D1 had not lost by the termination of the joint venture agreement as they had sold D3's share of the shophouses and had been able to redeem the charges for the same except for the two shoplots sold to D2. This knowledge that D1 had not actually suffered by the termination leads to the conclusion that this RM280,000 should only be claimed against D3 if at all, which is subject to any other deductions due to D3 from D1 by way of damages. This is so because D2 was never a party to the joint venture agreement between D1 and D3 on 13 December 1980, the supplementary agreement for the charge between them on 5 June 1981 and the compromise agreement between them on 13 June 1984.

[3] D2 was not at all to blame for the abandonment of the project as they had in fact done 75% of the work without being paid by D3. They were not in a position to continue especially when D1 had terminated the joint venture agreement with D3. From the evidence adduced, it could only be for minor defects not amounting to good reason for termination.

[D1s' counterclaim against D2 dismissed with costs; D1's counterclaim against D3 allowed with costs. D2's counterclaim against D1 and D3 allowed with costs with damages to be assessed by the learned Senior Assistant Registrar.]

Case referred to:
Su Meu Ging v. Philip Yong Khiam Poon & Ors. and other appeals [1988] 1 CLJ (Rep) 282 ***(foll)***

Legislation referred to:
Housing Developers (Control and Licensing) Rules 1970, rr. 11, 12

For the Plaintiff - Lim Seong Chun; M/s. Lim Seong Chun & Co.
For the First/Defendants - Shanti Thambypillay; M/s. Azman, Davidson & Co.
For the Second Defendant - Ahmad Moosdeen; M/s. Chan, Moosdeen & Partners
For the Third Defendant - No appearance

JUDGMENT

Abdul Malek Ahmad J:

By an agreement dated 1 August 1984 (hereinafter "the said agreement") made between all three defendants, the third defendant, who were the developers, had sold H.S. (D) Dindings 1558/80 for P.T. No. 5527 in the Mukim of Sitiawan in the State of Perak (hereinafter "the said lot") together with a three storey shophouse to be erected thereon by the third defendant, to the second defendant, who were the contractors, for the sum of RM300,000 with the consent and knowledge of the first defendants, who were the registered owners. By a deed of assignment dated 4 March 1985 (hereinafter "the said deed") the second defendant had assigned the rights and interests of the said agreement and of the said lot with the shophouse thereon to the plaintiff for RM240,000.

The plaintiff had paid RM24,000 as deposit under the said deed and pursuant to recital 5 thereof had paid a further sum of RM65,000 to the advocates and solicitors acting as stakeholders for the second and the third defendants. According to the plaintiff in his statement of claim filed on 11 February 1987, the second and the third defendants had abandoned the construction works and had left the said shophouse uncompleted thus necessitating him to make this claim.

In the meantime and this fact is stated in the said deed, the said lot had been charged by the third defendant to Perwira Habib Bank in Kuala Lumpur and as at the end of 1986, the redemption sum for the said lot was RM100,000. The plaintiff had pleaded that there had been a breach of cl. 3 of the said agreement, as neither the second nor the third defendant was able to transfer the said lot to the plaintiff free of encumbrances, and of cl. 10, as the shophouse was not completed on 31 January 1986 which was eighteen months after the date of the said agreement. By virtue of cl. 11, the plaintiff contended that he was entitled to damages for late delivery. The plaintiff had further pleaded that following the abandonment of the project by the second and the third defendants, the first defendants had expended a sum of RM40,000 to complete the said shophouse and had claimed this amount from him.

The plaintiff had also stated that he had obtained a loan of RM100,000 from Public Finance Berhad to pay the balance of the purchase price which amounted to RM151,000 less the set off for late delivery due to him from which he was agreeable to pay the Perwira Habib Bank RM100,000 to redeem the title to the said lot and the balance to be utilised for payment of legal expenses for the discharge of charge, the payments of quit rent and assessment, costs and other unforeseen payments and any balance to meet the claims of any of the defendants. Consequently, the plaintiff had prayed for an order that the first defendants, or in default the Senior Assistant Registrar, do execute a valid and registrable transfer of the said lot to him and for vacant possession of the said lot and shophouse erected thereon to him.

Against this backdrop, the plaintiff had filed a summons-in-chambers on 30 March 1987 asking for orders for the same prayers as in the statement of claim. After several adjournments, the matter was eventually heard on 27 June 1988 and I had decided on 1 August 1988 as follows:

(1) the plaintiff is willing to pay RM151,000 for the title;

(2) the first defendants agree to deliver provided RM40,538.60 is paid to them;

(3) the second defendant agrees to the application provided RM158,000 is paid to them for their expenses and also because second defendant had also paid to third defendant more than the purchase price due;

(4) in the circumstances, second defendant contends they are not liable to deliver the title even if the RM151,000 is paid;

(5) from the affidavits and arguments, it is apparent that there are triable issues as to who is liable for the late delivery charges and redemption sum and to whom should the RM151,000 go;

(6) in the event, the summons-in-chambers is dismissed but each party to bear their own costs;

(7) however, Court advises parties to sort out proportion due to each so that trial may not be necessary.

About three months after the filing of the plaintiff's summons-in-chambers, the second defendant had also applied by way of summons-in-chambers filed on 19 June 1987 for final judgment against the plaintiff for RM158,100, interest and costs as claimed in their counterclaim. This was heard by the learned Senior Assistant Registrar on 6 April 1988 and he had dismissed it with costs on 23 April 1988 on the grounds that there were triable issues. The notice of appeal against this decision was filed on 26 April 1988 and I had heard arguments on 3 February 1989. On 3 March 1989, I had decided that, as correctly held by the learned Senior Assistant Registrar and as I had decided earlier for the plaintiff's summons-in-chambers, there were triable issues as to who the money is to be paid to and the actual amount of money to be paid. As such, I had dismissed the appeal with costs.

There were no appeals to the decisions I made on 1 August 1988 and 3 February 1989 but the plaintiff had subsequently filed a summons-in-chambers on 16 January 1990 applying for an early trial. Hearing was fixed on 5 November 1990 when the plaintiff's case was closed. On that date learned Counsel for the first defendants had applied for a postponement to file a reply to the second defendant's defence and counterclaim. On the next hearing date which was 8 December 1990, the first defendant was not well and could not testify. On 20 March 1991, the plaintiff was recalled for further cross-examination and the first defendant and her daughter had testified.

At that stage, the trial took an unexpected turn when after a short recess, learned Counsel for the plaintiff informed the Court that the case between the plaintiff and the defendants had been settled as follows:

(1) by consent plaintiff is to pay such redemption sum as required by Perwira Habib Bank to redeem title deed held under H.S.(D) 1558/80 PT 5527 Mukim of Sitiawan;

(2) first defendants are to execute memorandum of transfer in favour of plaintiff upon redemption forthwith;

(3) plaintiff to pay RM5,000 to second defendant upon presentation of transfer;

(4) first defendant to assist plaintiff in obtaining title deed and discharge of charge from Perwira Habib Bank, Kuala Lumpur;

(5) second defendant to withdraw counterclaim against plaintiff;

(6) first defendant to withdraw counterclaim against plaintiff;

(7) no order as to costs.

However, much to the surprise and, to some extent, dismay of the Court, the first and the second defendants could not agree as between themselves and the matter was adjourned to the following day.

It is pertinent to pause and ponder here that it had always been the plaintiff's stand from the start that he was prepared to pay the balance of RM151,000 due provided it is less the compensation payable to him for late delivery, the redemption sum payable to Perwira Habib Bank, the payments of quit rent and assessment, the legal expenses for discharge of charge and other unforeseen payments. My earlier decisions were only because of the disputed recipients for the plaintiff's payments. With the recorded settlement on 20 March 1991, I was therefore left with only the second defendant's counterclaim against the first defendants and the third defendant.

However, at the time of writing this judgment following the filing of the notice of appeal by the first defendants, I had been informed by learned Counsel for the first defendants that no decision had been made on the first defendants' counterclaim against the second defendant. A cursory check of the file revealed that this was because it was not in the bundle of pleadings before the Court although it was filed as an enclosure on 15 November 1988. I had consequently reconsidered the evidence and the submissions in the light of the counterclaim by the first defendants in the course of writing out this judgment.

As for the second defendant's counterclaim against the first defendants and the third defendant, they had asked for a declaration that RM589,000 is due and payable to them under the building agreement dated 30 November 1983 and that the sum be set off against the purchase price of RM600,000 for the two shoplots purchased by them pursuant to the set off agreement dated 24 September 1984 and damages for breach of contract, interest and costs. As against the first defendants, the second defendant had asked for damages for wrongful and illegal interference in the contractual relationship of the second defendant with the third defendant.

It has clearly been borne out in the pleadings and in the evidence that the second defendant was the main contractor by virtue of the building agreement with the third defendant dated 30 November 1983 and that the third defendant owed the second defendant RM589,000 for work done as per the architect's certificate at D20. This had been followed by the set off agreement made between them dated 24 September 1984 where the purchase price of RM300,000 for the said lot and shophouse thereon had been set off against the RM589,000 due. It must be remembered that the purchase of the said lot and shophouse had been entered into by all three defendants on 1 August 1984 through the said agreement. At the set off point of time therefore, the said lot and shophouse had been paid in full by the second defendant.

By the said deed dated 4 March 1985, the second defendant has assigned the said lot and shophouse to the plaintiff for RM240,000 for which RM89,000 had been paid leaving a balance of RM151,000. Subsequently, the third defendant had abandoned the project and the first defendants had engaged another contractor to complete the work and had in the process expended RM40,000 to complete the shophouse on the said lot. At all material times, the said lot and shophouse had been charged by the third defendant to the Perwira Habib Bank which charge had yet to be discharged at the date of the hearing.

The sequence of events in this case has brought about a situation whereby the second defendant and his assignee the plaintiff had yet to receive the said lot and shophouse thereon free from encumbrances from the first and the third defendants within the appointed time. The second defendant had paid all the monies due under the set off agreement and the plaintiff was willing to pay the balance due and had in fact settled the matter on this basis. The only issue here is whether the first defendants are just as liable as the third defendant as regards the late delivery of the said lot and shophouse thereon.

This situation is aptly covered by rr. 11 and 12 of the Housing Developers (Control and Licensing) Rules 1970 the relevant portion of which are reproduced here for ease of reference:

> 11. (1) No licensed housing developer who is not the proprietor of the land upon which a housing development is carried out shall enter into any contract of sale of any housing accommodation in that housing development unless the proprietor of the land is also a party to such contract of sale and agrees to the sale of the land for purposes specified in such contract of sale.

(2) For the purpose of the preceding para. (1) such provisions in r. 12 as applied to a licensed housing developer in his capacity as a proprietor of the land shall be applicable to a proprietor entering into a contract of sale as prescribed under the provisions of the preceding para. (1).

12. (1) Every contract of sale shall be in writing and shall contain within its terms and conditions provisions to the following effect, namely:

(a) provisions binding on the licensed housing developer that the land sold to the purchaser together with the housing accommodation to be erected thereon is free from:

(i) any agricultural or industrial condition expressed or implied; and

(ii) any restriction against the construction of such housing accommodation;

(b) provisions binding on the licensed housing developer that immediately after a contract of sale has been signed the licensed housing developer shall not subject the land sold to the purchaser to any encumbrance without the prior approval of the purchaser;

(c) provisions binding on the licensed housing developer to ensure that the land sold to the purchaser shall be free from any encumbrance immediately prior to the handing over of vacant possession of the housing accommodation to the purchaser;

(d) provisions specifying a statement relating to the purchase price of the land sold to the purchaser together with the housing accommodation to be erected thereon;

(e) provisions setting out the scheme of payments of the purchase price by instalments as prescribed in schedule C to these rules;

((f) to (n) not relevant);

(o) provisions specifying the date of delivery of the vacant possession of the housing accommodation to the purchaser which date shall not be later than 18 months after the date of signing of the contract of sale;

((p) to (u) not relevant);

(2) Notwithstanding the provisions of para. (1) of this rule, where the Controller is satisfied that owing to special circumstances the compliance with any provisions of this rule is impracticable or unnecessary he may by a certificate in writing waive or modify such provisions in respect of any contract of sale.

(3) The provisions of this Rule shall not apply to an agreement for sale in respect of sub-divided buildings or housing accommodation erected on land held under leases.

Judicial sanction to these provisions had been given by the Supreme Court in *Su Meu Ging v. Philip Yong Khiam Poon & Ors. & Other Appeals* [1988] 1 CLJ (Rep) 282 which had ruled that in a similar situation, the developers had acted as agents for the landowners in disposing of the lots and as the purchasers had paid the full amounts, as in the case of the second defendant here, and the landowners had parted with their interest, they (the landowners) were merely trustees for the purchasers. In their judgment, the Supreme Court had stated that the fact that the landowners had not received the money is not relevant which is similar to the facts in this case as the purchase price was in fact set off against the third defendant by the second defendant. As the first defendants and the third defendant had failed to deliver the said lot and shophouse thereon free of encumbrances to the second defendant, they had been unable to deliver the same to the plaintiff and had lost the RM151,000 balance of the purchase price in the process. The fact that the first defendants did not consent to the assignment of the said lot and shophouse thereon from the second defendant to the plaintiff is irrelevant as by allowing

the third defendant to develop the project, the first defendants had appointed the third defendant as their agent and they only remained bare trustee as stated in the legislation referred and the case authority cited. By terminating the joint venture agreement with the third defendant, the first defendants had consequently also interfered with the contractual rights of the purchasers and contractors of the third defendant. My view is that both the said purchasers and contractors have a right to damages against both the first defendants and the third defendant who are of course entitled to claim against one another.

It is also clear from the evidence that the first defendants had not lost by the termination of the joint venture agreement as they had sold the third defendant's share of the shophouses and had been able to redeem the charges for the same except for the two shoplots sold to the second defendant. The first defendants had refused, quite understandably, to disclose the remainder in the account of the first defendants, and it is with this knowledge that the first defendants had not actually suffered by the termination and that at the most they had expended only RM40,000 to get the replacement contractors to complete the relevant shoplot, which claim had been withdrawn by virtue of the recorded settlement with the plaintiff, and RM280,000 for all the remaining shophouses, that I am of the opinion that this amount of RM280,000 should only be claimed against the third defendant if at all which is of course subject to any other deductions due to the third defendant from the first defendant by way of damages. This is so because the second defendant was never a party to the joint venture agreement (D12) between the first defendants and the third defendant on 13 December 1980, the supplementary agreement for the charge (D15) between them on 5 June 1981 and the compromise agreement (D14) between them on 13 June 1984. Accordingly, upon subsequent consideration of the first defendants' counterclaim at the time of writing, my view was that it ought to be dismissed with costs against the second defendant but should be granted with costs as against the third defendant.

It is also my view that the second defendant was not at all to blame for the abandonment of the project as they had in fact done 75% of the work without being paid by the third defendant. They were really not in a position to continue especially when the first defendants had terminated the joint venture agreement with the third defendant. In any case, the abandonment cannot be because the third defendant did not pay the second defendant as a result of major defects in the work which has not been proved at all to the satisfaction of the Court. At the most, from the evidence adduced, it could only be for minor defects not amounting to good reason for termination.

In the event, I had given judgment to the second defendant as prayed in their counterclaim against the first defendants and the third defendant with costs with damages to be assessed by the learned Senior Assistant Registrar. As I had stated earlier, I had made no order on 5 June 1991 as to the first defendants' counterclaim against the second and the third defendants as there was no copy of the same in the bundle of pleadings although it was referred to in the written submissions but I had corrected the situation by doing so on 4 July 1991 when I had given judgment as prayed in the first defendants' counterclaim as against the third defendant but had dismissed it with costs as against the second defendant.

Also found at [1991] 3 CLJ 2475